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SUPREME COURT, U. S.

No. 71-277

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN THOMAS PRICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial with his brother William in the United States District Court for the Western District of New York, petitioner was convicted of conspiracy to steal goods moving in interstate commerce, and of theft of those goods, in violation of 18 U.S.C. 371, 659. He was sentenced to four years' imprisonment, with three years suspended, and a fine of $15,000. The court of appeals affirmed the conviction on July 8, 1971. The petition for a writ of cer-

tiorari, filed August 23, 1971, is out of time under Rule 22-2 of the Rules of this Court.

The evidence showed (Pet. App. 10) that petitioner arranged for the theft of a load of copper with the driver of the truck and that two co-defendants named Sutton were to take the stolen copper to a warehouse owned by petitioner's grandfather. Petitioner forgot to give the Suttons the key to the warehouse. William Price, petitioner's brother, accompanied the Suttons to the warehouse and broke the lock so that the goods could be stored. Petitioner's brother was convicted of receipt of stolen goods.

The sole issue which petitioner raises relates to two searches by Pennsylvania State Police and an F.B.I. agent of the warehouse of petitioner's grandfather in New Milford, Pennsylvania, pursuant to search warrants obtained by the state police from a magistrate without a written affidavit. In the course of the second search officers found copper coil from the stolen shipment. At the time of the searches neither petitioner nor William was on the premises.

Both petitioner and his brother challenged the validity of the searches at trial. The district judge denied the motions to suppress, holding that neither defendant possessed standing. The court of appeals, in a thorough opinion, held that William had standing to contest the searches, since the crime with which he was charged included possession of the seized evidence as an "essential element". See *Simmons* v. *United States*, 390 U.S. 377, 389-390; *United States* v. *Cobb*, 432 F.2d 716 (C.A. 4); *United States* v. *Allsenberrie*, 424 F.2d 1209 (C.A. 7); *Glisson* v.

United States, 406 F.2d 423, 427 (C.A. 5); *Niro* v. *United States*, 388 F.2d 535 (C.A. 1); *Kuhl* v. *United States*, 370 F.2d 20, 34-36 (C.A. 9) *(in banc)*. Accordingly it vacated William's conviction and remanded his case for determination of the validity of the searches. The court of appeals concluded, however, that petitioner lacked standing to challenge the searches, since the crimes with which he was charged (conspiracy and theft) did not include possession as an element, and petitioner could not obtain standing derivatively through his co-defendant. See *Alderman* v. *United States*, 394 U.S. 165, 171-172. This ruling was correct.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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